STATE OF MICHIGAN

COURT OF APPEALS

DAVID W. OIMAS,

Plaintiff-Appellant,

v

TRADEWINDS AVIATION, INC.,

Defendant-Appellee,

and

RICHARD M. NINI,

Defendant-Appellee.

UNPUBLISHED
July 19, 2005

No. 247762
Oakland Circuit Court
LC No. 2000-024757-NZ

DAVID W. OIMAS,

Plaintiff-Appellee,

v

TRADEWINDS AVIATION, INC.,

Defendant-Appellant,

and

RICHARD M. NINI,

Defendant-Appellant.

No. 248409
Oakland Circuit Court
LC No. 2000-024757-NZ

DAVID OIMAS,

Plaintiff-Appellant,

v

No. 255789
Oakland Circuit Court

TRADEWINDS AVIATION, INC., LC No. 2003-047674-NZ

Defendant-Appellee,

and

RICHARD M. NINI,

Defendant-Appellee.

Before: Bandstra, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

These consolidated cases arise out of plaintiff David Oimas' employment with and subsequent termination from defendant Tradewinds Aviation, Inc. by defendant owner Richard Nini (hereinafter 'defendant,' collectively, unless otherwise specified). In docket number 247762, plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant on his whistleblower protection claim. In docket number 248409, defendant appeals as of right the trial court's denial of its motion for case evaluation sanctions. In docket number 255789, plaintiff appeals as of right the trial court's dismissal of his petition to vacate, modify, or correct the arbitration award. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Docket No. 247762

A. Plaintiff's Whistleblower Protection Claim

1. Collateral Estoppel Effect of Arbitrator's Findings of Fact

Plaintiff first argues that the trial court erred in granting summary disposition in favor of defendant on his whistleblower protection claim. We disagree. We review de novo a trial court's ruling on a motion for summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

The employment agreement between the parties provided that "should either [party] terminate [plaintiff's] employment . . . and, in connection therewith, any controversy shall arise as to whether or not there was good cause for such termination, such controversy shall be resolved solely and exclusively by the submission of said controversy to arbitration . . . ." The employment agreement "constitute[d] the entire agreement among the parties hereto in connection with the subject matter hereof," and "supersede[d] any and all other agreements, either oral or written, among the parties with respect to the subject matter hereof." Further, the

agreement provided that it could "not be modified orally," and that "no modification [would] be effective unless in writing and signed by all the parties."[1]

The arbitration provision of the employment agreement provided that a court could render judgment on the arbitration award[2]; therefore, the arbitration constitutes statutory arbitration, governed by the Michigan arbitration act, MCL 600.5001 *et seq*. *Hetrick v Friedman*, 237 Mich App 264, 268-269; 602 NW2d 603 (1999); *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 174; 550 NW2d 608 (1996).

Plaintiff argues that the trial court erred in granting summary disposition in favor of defendant on the basis that the arbitrator's findings of fact had collateral estoppel preclusive effect on his whistleblower protection claim. We review de novo as a question of law the applicability of collateral estoppel. *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996). "Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Id*. Similarly, the principle of collateral estoppel applies to factual determinations made during arbitration proceedings. *Porter v Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995).

Here, the parties entered into an employment agreement which expressly provided that plaintiff's employment could not be terminated except for good cause, and that all controversies arising as to whether good cause for termination existed would be resolved exclusively by arbitration.[3] Following his termination, plaintiff voluntarily submitted his claim to arbitration

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[1] Plaintiff contends that the parties agreed that the arbitration award would not implicate his whistleblower protection claim, and relies on the alleged confirmation of this agreement in a case management conference call between the parties and the arbitrator to support his assertion. However, plaintiff cannot avoid the clear terms of the employment agreement—to the extent any oral agreement was reached and confirmed during a conference call, any such agreement was never finalized in writing and signed by the parties. Plaintiff is confined to the terms of the employment agreement, and any alleged oral modification was not binding on the parties.

[2] The arbitration provision of the employment agreement provided that "[t]he decision of the arbitrator with respect to the controversy submitted thereto shall be final and binding on [defendant] and [plaintiff], and upon the request of either party, a judgment of any Circuit Court having jurisdiction over such matter may be rendered upon the arbitrator's award made pursuant to th[e] [employment agreement]," and that "[s]uch judgment shall be valid and enforceable against both [defendant] and [plaintiff]."

[3] While this Court has held that the Legislature intended the whistleblowers' protection act to be judicially enforceable in situations where the plaintiff also had arbitrable claims, *Hopkins v City of Midland*, 158 Mich App 361, 374; 404 NW2d 744 (1987), that case is distinguishable in that there, the parties had not contractually agreed to arbitrate the issue. Indeed, the *Hopkins* Court specifically commented that the parties "could have contractually agreed to arbitrate this issue had they chosen to do so." *Id*. By agreeing that arguments about whether there was good cause for termination were arbitrable, plaintiff also agreed that whether termination was, instead, prompted by whistleblowing was an arbitrable question.

(continued…)

and additionally filed a whistleblower protection claim. However, the arbitrator's factual finding that plaintiff was terminated for good cause precluded plaintiff from establishing the necessary elements of his whistleblower protection claim. That is, where plaintiff was terminated for good cause, he could not establish that defendant terminated his employment for engaging in an activity protected under the WPA. The trial court correctly ruled that plaintiff was estopped from contesting the factual findings made by the arbitrator, and properly granted summary disposition in favor of defendant on that basis. See *Cole v West Side Auto Employees Fed Credit Union*, 229 Mich App 639; 583 NW2d 226 (1998).[4]

2. Existence of Arbitration Agreement as an Affirmative Defense

Plaintiff next argues that the trial court erred in granting summary disposition in favor of defendant on the basis that it failed to assert the affirmative defense of the existence of an agreement to arbitrate in its responsive pleading, either included as an affirmative defense or by bringing a motion for summary disposition. A party generally must raise the affirmative defense of the existence of an agreement to arbitrate in its responsive pleading, or be deemed to have waived the defense. *Campbell v St. John Hosp*, 434 Mich 608, 616-617; 455 NW2d 695 (1990).

MCR 2.111(F)(3)(a) provides that the affirmative defense of "the existence of an agreement to arbitrate" must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118. *Kelly-Nevils v Detroit Receiving Hosp*, 207 Mich

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In *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 123; 596 NW2d 208 (1999), this Court held that "as long as no rights or remedies accorded by the statute are waived, and as long as the procedure is fair, employers may contract with their employees to arbitrate statutory civil rights claims." And this Court has found "no grounds for distinguishing actions under the WPA from civil rights actions under the [Civil Rights Act] for purposes of applying *Heurtebise* [*v Reliable Business Computers, Inc*, 452 Mich 405, 413; 550 NW2d 243 (1996)]." *Stewart v Fairlane Comm Mental Health Centre (On Remand)*, 225 Mich App 410, 423; 571 NW2d 542 (1997). Specifically, the *Rembert* Court concluded that "predispute agreements to arbitrate statutory employment discrimination claims are valid if: (1) the parties have agreed to arbitrate the claims (there must be a valid, binding, contract covering the civil rights claims), (2) the statute itself does not prohibit such agreements, and (3) the arbitration agreement does not waive the substantive rights and remedies of the statute and the arbitration procedures are fair so that the employee may effectively vindicate his statutory rights." *Rembert*, *supra* at 156. Applying the *Rembert* analysis to the instant case, it appears that the employment agreement including the arbitration provision was valid. Therefore, the arbitration decision precluded plaintiff's whistleblower protection claim, and the trial court properly granted summary disposition in favor of defendant.

[4] To the extent plaintiff argues that the trial court entered an overbroad order making all of the arbitrator's findings of fact binding on his whistleblower protection claim, we note that the arbitrator's determination that plaintiff was terminated for good cause necessarily precluded plaintiff's claim that he was terminated for engaging in some activity protected under the WPA. Additionally, to the extent plaintiff takes issue with the arbitrator's reliance on federal law to determine the date of plaintiff's termination, we note that this reliance, however misplaced, does not detract from the arbitrator's ultimate factual finding that plaintiff was terminated for good cause.

App 410, 420; 526 NW2d 15 (1994). MCR 2.111(F)(2) provides that "[a] defense not asserted in the responsive pleading or by motion as provided by these rules is waived." Additionally, MCR 2.116(B) and (C)(7) provide that a party may move for dismissal of or judgment on all or part of a claim on the ground that the claim is barred because of an agreement to arbitrate. MCR 2.116(D)(2) provides that the grounds listed in MCR 2.116(C)(7) must be raised in a party's responsive pleading.

Here, defendant did not assert the affirmative defense of the existence of the agreement to arbitrate in its affirmative defenses, nor did it file a motion for summary disposition under MCR 2.116(C)(7) as its responsive pleading. Further, defendant never sought to amend its pleadings to assert the existence of the arbitration agreement as an affirmative defense. However, this Court has held that "it makes sense to allow [affirmative defenses] to be raised when they become legally available." *Moorhouse v Ambassador Ins Co, Inc*, 147 Mich App 412, 419; 383 NW2d 219 (1985). And here, defendant moved for summary disposition on the basis that the arbitrator's decision collaterally estopped plaintiff's whistleblower protection claim immediately after the arbitration award was announced. That is, defendant raised the affirmative defense of the existence of an agreement to arbitrate, and, in turn, the collateral estoppel preclusive effect the arbitrator's decision had on plaintiff's whistleblower protection claim, when it became legally available. And plaintiff does not dispute defendant's assertion that it moved for summary disposition based on the arbitrator's findings of fact, and consequently, the existence of an agreement to arbitrate.[5] Moreover, plaintiff did not set forth any allegation that defendant's delayed assertion of the existence of the agreement to arbitrate unfairly surprised him or otherwise prejudiced him. Defendant moved for summary disposition based on the existence of an agreement to arbitrate within a reasonable time of the arbitrator's decision, and no indication exists that plaintiff suffered any unfair prejudice. Therefore, we conclude that defendant's failure to assert the existence of an agreement to arbitrate in its responsive pleading, either included as an affirmative defense or by bringing a motion for summary disposition, did not prevent it from subsequently raising the issue, and the trial court properly granted defendant's motion for summary disposition on the basis of the arbitration provision of the employment agreement. See *Meridian Mut Ins Co v Mason-Dixon Lines, Inc (On Remand)*, 242 Mich App 645, 648; 620 NW2d 310 (2000).

B. Plaintiff's Motion to Amend for Exemplary Damages

Plaintiff next argues that the trial court abused its discretion in denying his motion to amend for exemplary damages. We review a trial court's ruling on a motion to amend for an abuse of discretion. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 9; 614 NW2d 169 (2000). An abuse of discretion is found only if an unprejudiced person, considering the facts on

[5] To the extent plaintiff argues that the parties did not agree to submit his whistleblower protection claim to the arbitrator, plaintiff ignores the express language of the arbitration provision of the employment agreement, which provided that "should either [party] terminate [plaintiff's] employment . . . and, in connection therewith, any controversy shall arise as to whether or not there was good cause for such termination, such controversy shall be resolved solely and exclusively by the submission of said controversy to arbitration . . . ."

which the trial court acted, would say there is no justification or excuse for the ruling made. *Campbell v Sullins*, 257 Mich App 179, 196; 667 NW2d 887 (2003). MCR 2.118(A)(2) provides that leave to amend should be "freely given when justice so requires." However, leave to amend should not be granted in the face of "any apparent or declared reason, such as undue delay, bad faith, or dilatory motive on the part of the movant . . . [or] undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of amendment." *Cole*, *supra* at 9-10.

On June 6, 2001, plaintiff moved to amend his complaint to include exemplary damages. At the hearing on plaintiff's motion to amend, the trial court summarily denied plaintiff's motion to amend on the basis that it was "late"—trial was scheduled for June 19, 2001. However, our Supreme Court has commented that "[w]hile '[a]s a general rule, the risk of substantial prejudice increases with the passage of time,' in the absence of a showing of either bad faith or actual prejudice, mere delay does not warrant denial of a motion to amend." *Ben P. Fyke & Sons v Gunter Co*, 390 Mich 649, 663-664; 213 NW2d 134 (1973), quoting 6 Wright & Miller, Federal Practice and Procedure, § 1488, p 439. Additionally, this Court has upheld the grant of a motion to amend a complaint to add exemplary damages even where "the amendment came shortly before trial," where "the amendment did not raise new factual allegations, but merely claimed new types of damages arising from the same set of factual allegations." *Sherrard v Stevens*, 176 Mich App 650, 654-655; 440 NW2d 2 (1988). Therefore, the trial court's denial of plaintiff's motion to amend on the basis that it was "late" constituted an abuse of discretion in contravention of the liberal policy set out in MCR 2.118(A)(2), where there was no undue delay, bad faith, or dilatory motive on the part of plaintiff, nor would there have been undue prejudice to defendant by allowing the amendment. *Cole*, *supra* at 9-10.

However, defendant correctly asserts that because the WPA does not expressly provide for exemplary damages, they would have been unavailable to plaintiff, and the trial court's denial of plaintiff's motion to amend would have been proper on the basis that the amendment would have been futile. *Cole*, *supra* at 9-10; see *Eide v Kelsey-Hayes Co*, 431 Mich 26, 54-56; 427 NW2d 488 (1988) (award of exemplary damages erroneous in civil rights claim, where CRA provides only for actual damages, and statute does not contain express provision for exemplary damages). See also *Beltowski v Heritage Inn*, unpublished opinion per curiam of the Court of Appeals, decided August 6, 1996 (Docket No. 173378) (award of exemplary damages under WPA must be reversed, because WPA contains no express provision for such damages). Therefore, we affirm the trial court's denial of plaintiff's motion to amend to include exemplary damages on the basis that it reached the right result, albeit for the wrong reason. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 470; 628 NW2d 577 (2001).

C. Plaintiff's Issue Concerning Appearance of Impropriety

Plaintiff next argues that it was improper for the trial court to allow defense counsel's wife to serve as court reporter, because it created an appearance of impropriety which affected the course of the litigation. Plaintiff raised the issue in his answer to defendant's motion to adjourn trial, asserting that the scheduled hearing on the motion should not be transcribed by the court reporter, because of her marriage to defense counsel. Plaintiff further asserted that "[t]he continued appearance of [defense counsel] in this case in this Court under these circumstances creates a condition in which there is an appearance of impropriety and the Court should consider whether or not permitting this condition to continue is appropriate." However, because the trial court never addressed the issue, it is not preserved for appeal. *ISB Sales Co v Dave's Cakes*, 258

Mich App 520, 532-533; 672 NW2d 181 (2003); *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997).

In any event, there is nothing in the record to support plaintiff's assertion that defense counsel's marriage to the court reporter in any way affected the trial court's rulings, some of which were adverse to plaintiff. Further, the only authority plaintiff cites in support of his argument that the court reporter should have been disqualified is MCR 2.304(C) (deposition may not be taken before a person who is a relative of an attorney for a party), which is wholly inapposite, because it applies only to depositions, and not trial court proceedings. Plaintiff offers no further explanation or authority to support his position. And "[a] party may not simply announce its position and 'leave it to this Court to discover and rationalize the basis for the party's claim.'" *Badiee v Brighton Area Schools*, 265 Mich App 343, 357; 695 NW2d 521 (2005), quoting *Conlin v Scio Twp*, 262 Mich App 379, 384; 686 NW2d 16 (2004). Plaintiff's argument is merely an attempt to challenge the merit of the trial court's rulings under the guise of an alleged "appearance of impropriety" created by defense counsel's relationship to the court reporter, and does not warrant relief.[6]

II. Docket No. 248409

Defendant argues that the trial court erred in denying its motion for case evaluation costs under MCR 2.403(O)(1) and (2)(c), where plaintiff rejected the case evaluation, the action proceeded to verdict ("a judgment [was] entered as a result of a ruling on a motion after rejection of the case evaluation," i.e., plaintiff's WPA claim was dismissed as the result of the trial court's grant of defendant's motion for summary disposition), and where the verdict (dismissal) was more favorable to defendant than the case evaluation. This Court reviews de novo a trial court's decision whether to grant mediation sanctions. *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 129; 573 NW2d 61 (1997).

MCR 2.403(O)(1) provides:

> If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

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[6] While plaintiff's issue on appeal is framed in terms of the trial court improperly permitting defense counsel's wife to serve as court reporter, plaintiff makes a tangential argument that the trial judge should have disqualified himself, and violated the Michigan Judicial Code of Conduct, Canon 2, Section C ("[a] judge should not allow family, social, or other relationship to influence judicial conduct or judgment") in not so doing. However, plaintiff specifically raises the issue whether the trial judge erred in failing to disqualify himself in docket no. 255789, which will be discussed *infra*.

MCR 2.403(O)(2)(c) provides that for the purpose of the rule, "verdict" includes "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation." Here, plaintiff rejected an evaluation and the action proceeded to verdict, i.e., plaintiff's case was dismissed as a result of the trial court's grant of defendant's motion for summary disposition. Therefore, plaintiff was required to pay defendant's actual costs where defendant also rejected the evaluation, and where the "verdict" of dismissal was more favorable to defendant than the case evaluation.

Here, the trial court, relying exclusively on this Court's decision in *St George Greek Orthodox Church of Southgate, Michigan v Laupmanis Assoc, PC*, 204 Mich App 278; 514 NW2d 516 (1994), held that because plaintiff's claim "was essentially resolved by the arbitration decision," defendant was not entitled to case evaluation sanctions. In *Cusumano v Velger*, 264 Mich App 234, 238; 690 NW2d 309 (2004), this Court recently summarized: "*St George* involved a dispute related to a contract that required disputes to be resolved through arbitration proceedings and an eventual court order submitting the matter to arbitration. At issue on appeal was whether mediation sanctions were available under MCR 2.403. This Court concluded that there was no right to mediation sanctions under MCR 2.403 (at least as then in effect) when a matter is resolved by arbitration and a court merely enters an order confirming the award." (internal citations omitted). Further, this Court noted that the analysis in *St George* "focused largely on the use of the phrase 'proceeds to trial' in MCR 2.403(O)(1) as in effect at the pertinent time and that arbitration does not constitute a trial." *Cusumano*, *supra* at 238 n 2. This Court acknowledged that "[i]n the current version of MCR 2.403(O)(1), the phrase 'proceeds to trial' has been replaced with the phrase 'proceeds to verdict.'" *Id*.

On the basis of *Cusumano*, we conclude that the trial court clearly erred when it failed to award defendant case evaluation sanctions under the current version of MCR 2.403(0).

III. Docket No. 255789

A. Defendant's Motion for a Protective Order

Plaintiff argues that the trial court abused its discretion in granting defendant's motion for a protective order quashing the deposition of the original arbitrator, because it would have established the law of the case. We disagree. We review a trial court's decision whether to grant a protective order for an abuse of discretion. *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 35; 654 NW2d 610 (2002). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling made. *Campbell*, *supra* at 196.

MCR 2.302(C)(1) provides that "[o]n motion by a party . . . and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a . . . person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that discovery not be had." "While Michigan is strongly committed to open and far-reaching discovery, a trial court must also protect the interests of the party opposing discovery so as not to subject that party to excessive, abusive, or irrelevant discovery requests." *In re Hammond*, 215 Mich App 379, 386; 547 NW2d 36 (1996) (citations omitted).

Here, defendant moved for a protective order under MCR 2.302(C)(1) quashing a subpoena directed to John Obee, on the basis that although Obee was initially selected to serve as the parties' arbitrator, when it was discovered that Obee had a previous working relationship with plaintiff's counsel, the parties agreed to select a different neutral arbitrator. Because Obee did not conduct the parties' arbitration and never issued an award of any kind on the matter, defendant argued that a protective order preventing discovery was warranted to protect Obee from annoyance and undue burden and expense. Plaintiff responded that the law of the case was established by the arbitration agreement which had been submitted to Obee, and that, contrary to defendant's assertion that the parties agreed to select a neutral arbitrator, Obee recused himself from the case under fear of litigation from defendant after defendant moved for Obee's recusal and the American Arbitration Association denied defendant's motion. The trial court granted defendant's motion for a protective order to quash the deposition of Obee on the basis that plaintiff failed to establish a justifiable reason to allow the deposition of Obee, where Obee never served as the parties' arbitrator.

This Court has held that "[u]nder Michigan case law, discovery rules are to be liberally construed," and parties may generally "obtain discovery regarding any matter not privileged which is relevant to the subject matter involved in the pending action." *Fitzpatrick v Secretary of State*, 176 Mich App 615, 617; 440 NW2d 45 (1989); MCR 2.302(B)(1). However, here, despite plaintiff's argument that Obee's deposition would establish the law of the case because the arbitration agreement had been submitted to him initially, plaintiff failed to establish the relevance of the deposition of an arbitrator who did not actually hear the parties' case, and the trial court's decision to grant defendant's motion for a protective order to quash Obee's deposition did not constitute an abuse of discretion.

B. Plaintiff's Petition to Vacate, Modify, or Correct the Arbitration Award; Defendant's Request that Award be Confirmed

Plaintiff next argues that the trial court erred in dismissing plaintiff's petition to vacate, modify, or correct the arbitration award. We disagree. We review de novo a trial court's decision to enforce, vacate, or modify a statutory arbitration award. *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003). Here, plaintiff requested that "the award of the [a]rbitrator be set aside and held to be void for the reasons set forth above (arbitrator exceeded his powers) and that it be corrected to delete any reference to the employer actions with reference to [plaintiff] on May 26th," pursuant to MCR 3.602(J) and (K).

MCR 3.602(J)(1) provides that a trial court should vacate an award if: (a) the award was procured by corruption, fraud, or other undue means; (b) there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights; (c) the arbitrator exceeded his or her powers; or (d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights. MCR 3.602(K)(1) provides that a trial court should modify or correct an award if: (a) there is an evident miscalculation of figures or an evident mistake in the description of a person, a thing, or property referred to in the award; (b) the arbitrator has awarded on a matter not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the issues submitted; or (c) the award is imperfect in a matter of form, not affecting the merits of the controversy.

In his petition to vacate, modify, or correct the arbitration award, plaintiff argued that the arbitrator exceeded his powers and awarded on a matter not submitted to the arbitrator, i.e, plaintiff's whistleblower protection claim. MCR 3.602(J)(1)(c); MCR 3.602(K)(1)(b). However, as noted above, the arbitrator's finding that plaintiff was terminated for good cause necessarily precluded plaintiff's claim that he was terminated for engaging in activity protected under the WPA. Additionally, plaintiff argued that the arbitrator exceeded his powers by applying federal law to determine the date of plaintiff's termination. MCR 3.602(J)(1)(c). However, as noted above, the arbitrator's misplaced reliance on federal law does not detract from the ultimate factual finding that plaintiff was terminated for good cause. Plaintiff also argued that the arbitrator demonstrated partiality in favor of defendant in violation of MCR 3.602(J)(1)(b). However, plaintiff has failed to demonstrate that there was evident partiality on the part of the arbitrator.

Moreover, plaintiff summarily asserts in his brief on appeal that the trial court erred in dismissing his petition, yet fails to support that contention with sufficient argument, citation of the record, or citation of supporting authority. And it is well settled that a party may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims nor may he give issues cursory treatment with little or no citation of supporting authority. *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003). "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Id*. at 339-340. Therefore, we deem the issue abandoned and affirm the trial court's dismissal of plaintiff's petition to vacate, modify, or correct the arbitration award.

Defendant argues on appeal that this Court should remand this case for entry of an order confirming the arbitrator's award. Here, the arbitration award was rendered on February 3, 2003, and defendant did not move to confirm the arbitration award until April 7, 2004. MCR 3.602(I) provides that "[a]n arbitration agreement filed with the clerk of the court designated in the agreement or statute within one year after the award was rendered may be confirmed by the court, unless it is vacated, corrected, or modified . . . ." Therefore, the trial court properly declined to confirm the award under MCR 3.602(I) because defendant's motion was time-barred. However, despite defendant's untimeliness under MCR 3.602(I), MCR 3.602(J)(4) provides that "[i]f the application to vacate is denied and there is no motion to modify or correct the award pending, the court shall confirm the award." Therefore, the trial court was required to confirm the award by the mandatory language set out in MCR 3.602(J)(4), and we remand for entry of an order confirming the arbitrator's award.

C. Plaintiff's Motion to Disqualify the Trial Judge

Plaintiff next argues that the trial court erred in denying his motion to disqualify the Honorable Fred M. Mester. We disagree. Plaintiff's argument that the trial court erred in denying his motion to disqualify Judge Mester is unpreserved for review and does not warrant relief in any event. "[T]o preserve for appellate review the issue of a denial of a motion for disqualification of a trial court judge, a party must request referral to the chief judge of the trial court after the trial court judge's denial of the party's motion." *Welch v District Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996); MCR 2.003(C)(3)(a). Because plaintiff failed to seek review of the denial of his motion for disqualification from the chief judge of the circuit court until after this appeal was filed, plaintiff has not preserved this issue for review. *Id*.

However, even considering this claim on its merits, plaintiff has failed to show that Judge Mester was actually and personally biased or prejudiced against him so as to warrant disqualification under MCR 2.003(B)(1). "When this Court reviews a motion to disqualify a judge, the trial court's findings of fact are reviewed for an abuse of discretion; however, the applicability of the facts to relevant law is reviewed de novo." *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 596; 640 NW2d 321 (2001). Following a review of the lower court record, we find that Judge Mester did not abuse his discretion in finding that plaintiff's allegations of personal and actual bias or prejudice were unfounded and did not warrant disqualification under MCR 2.003(B)(1); therefore, we affirm the trial court's denial of plaintiff's motion to disqualify Judge Mester.

Plaintiff also requests that this Court remand to a different trial judge. "The general concern when deciding whether to remand to a different trial judge is whether the appearance of justice will be better served if another judge presides over the case." *Bayati v Bayati*, 264 Mich App 595, 602; 691 NW2d 812 (2004). This Court "may remand to a different judge if the original judge would have difficulty in putting aside previously expressed views or findings, if reassignment is advisable to preserve the appearance of justice, and if reassignment will not entail excessive waste or duplication." *Id*. at 602-603.

Plaintiff argues that "[t]he appearance of impropriety is manifest," and that "[b]ecause of multiple indications that the judge is biased, prejudiced and otherwise ill-suited to preside over the hearing and to render a fair judgment, the matter should be reassigned to a different judge." However, this Court "will not remand to a different judge merely because the judge came to the wrong legal conclusion," and "[r]epeated rulings against a party, no matter how erroneous, or vigorously or consistently expressed, are not disqualifying." *Id*. at 603. "Rather, plaintiff must demonstrate that the judge would be unable to rule fairly on remand given his past comments or expressed views." *Id*. Nothing in the record supports a finding that Judge Mester could not put his previous rulings out of his mind. Further, Judge Mester did not make any comments on the record indicating any expressed bias, and, to the contrary, expressly stated that he takes his reputation very seriously and strives to treat everyone who comes before him with fairness. Therefore, plaintiff has failed to meet the standard required to remand to a different judge, and we deny his request.

IV. Conclusion

In docket numbers 247762 and 248409, we reverse the trial court's denial of defendant's motion for case evaluation sanctions under MCR 2.403(O), but otherwise affirm. In docket number 255789, we affirm but remand this case for entry of an order confirming the arbitrator's award under MCR 3.602(J)(4). We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter